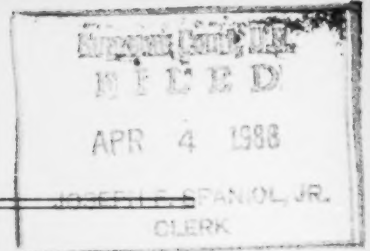


87-1415

No. 87-1416



In The
Supreme Court of the United States

October Term, 1987

MISSOURI HIGHWAY AND TRANSPORTATION
COMMISSION: ROBERT N. HUNTER, CHIEF
ENGINEER OF THE MISSOURI HIGHWAY AND
TRANSPORTATION COMMISSION and
V. B. UNSELL, DISTRICT ENGINEER FOR
DISTRICT 8 OF THE MISSOURI HIGHWAY
AND TRANSPORTATION COMMISSION,

Petitioners,

v.

JANE CATLETT, PATRICIA LEEMBRUGGEN,
GRACE TUTER and ADELINE KALLEMYN,
Individually and on behalf of all
other similarly situated,

Respondents.

**RESPONDENTS' BRIEF IN OPPOSITION TO
PETITIONER MISSOURI HIGHWAY AND
TRANSPORTATION COMMISSION'S PETITION
FOR WRIT OF CERTIORARI**

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April 6, 1988

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CORRECTED STATEMENT OF THE CASE

INTRODUCTION

The Highway Department's Certiorari Petition ignores the standard of review by focusing its arguments away from the evidentiary record and the findings of the trial court. Additionally, the Highway Department's characterization of the Eighth Circuit opinion is inaccurate and misleading. Respondent therefore wishes to review the Eighth Circuit opinion in the context of the record and the findings of the trial court.

I. Trial Court Findings

The issue of intentional discrimination was first addressed by the jury under 42 U.S.C. § 1983. Petitioner quietly acknowledges in a footnote (Petition for Certiorari (hereinafter "Petition") p. 4, n. 1) that the jury found in favor of the class on the issue of whether the Highway Department engaged in a pattern and practice of intentional discrimination against women in recruitment and hiring regarding its low-skilled, entry-level job of "maintenance man." The trial court then followed with a decision under Title VII on the basis of a substantial evidentiary record, finding pervasive and purposeful sex discrimination in numerous phases of recruitment, selection and hiring for the position of maintenance man. The trial court's findings must serve as a starting point in this analysis of whether the decision of the Court of Appeals should be reviewed by this Court.

A. Recruitment

The jury found that the Highway Department intentionally discriminated against the class of women in its

recruitment policies and practices. The Judge, under Title VII, found intentional as well as non-intentional discrimination in recruitment practices. Citing the "gross and statistically significant disparity between the number of women who actually applied for maintenance positions and the number of female applicants expected to apply when compared to the relevant labor pool," the trial court found that the Highway Department's word-of-mouth recruiting practices produced an abnormally small pool of female applicants. Referring to the statistical evidence, the Court states:

Moreover, the statistical evidence also provides support for the Plaintiffs' theory that the number of female applicants was lower due to the word-of-mouth recruiting practices of the Highway Commission. In 1975, when no women had been employed as maintenance man by District 8, there were only 9 female applicants. In 1976, when the first female was hired as a maintenance man by District 8, the number of female applicants rose to 16. In 1977, two more women were hired and 55 females applied in District 8. Similarly, in 1978, the number of women hired in District 8 reached a high of 5, and the number of female applicants rose to its highest level at 120. In 1979, no females were hired in District 8, and correspondingly, the number of female applicants dropped to 88. This parallel relationship between the number of women who were hired each year and the number of females who applied in the same year provides persuasive statistical support for the Plaintiffs' contention that the word-of-mouth recruiting practiced by District 8 had an adverse effect on the number of women who applied and were hired for the maintenance man position.

(Petitioners' Appendix, (hereinafter "Pet. App.") p. 52a).

The trial court also noted evidence of intentional recruitment discrimination citing the testimony of the Chief Engineer of the Highway Commission, Robert N. Hunter. Mr. Hunter acknowledged on cross-examination that as early as 1976, he recognized that the Commission's traditional methods of recruitment resulted in an underrepresentation of women applicants. In 1976, he documented his knowledge that local population statistics should be used as a guide in recruitment efforts. Neither he, nor his district engineer in District 8 followed through, however, by taking any meaningful steps to increase the number of female applicants. Despite the Chief Engineer's knowledge of underrepresentation, the Highway Department neither advertised in the media nor made an effort to contact womens' groups in the community to advise the public of the Commission's supposed willingness to hire women as maintenance men in District 8. (Pet. App., p. 34a).

Citing *Dothard v. Rawlinson*, 433 U.S. 321, 330 (1977) the trial court rejected the use of applicant flow statistics to measure discrimination in this case. Noting the Highway Commission's rebuttal of allegations of discrimination in recruitment practices, the court states as follows:

In rebuttal, the Highway Commission argues that there was no disparate impact because the Commission hired 2.6% of the female applicants between January 1, 1975 and May 31, 1980, while it hired only 2.5% of the male applicants during the same period. This argument is flawed, however, as it assumes that the applicant pool was not influenced by the Commission's recruitment and hiring process. A statistical showing of disproportionate impact need not be based on an analysis of the actual applicants, because "the

application process itself might not adequately reflect the actual potential applicant pool, since otherwise qualified people might be discouraged from applying because of a self-recognized inability to meet the very standards challenged as being discriminatory.” *Dothard v. Rawlinson*, 433 U.S. 321, 330, 97 S. Ct. 2720, 2727, 53 L.Ed.2d 786 (1977). See also *Donnell v. General Motors Corp.*, 576 F.2d 1292, 1298 (8th Cir. 1978). Even though the actual applicant data would indicate that there was no disproportionate impact, general population data (the first and third methods described in Green) can provide a basis for showing of disproportionate impact. *Hammeed v. Intern. Ass'n of Bridge, etc.*, 637 F.2d 506, 512 n.6 (8th Cir. 1980). “This is particularly the case where there is some threat to the validity to the actual applicant data.” *Id.*

(Pet. App., pp. 52a & 53a).

In this case, therefore the number of female applicants was chilled by the Highway Department's discriminatory recruitment and hiring practices.

Thus, the trial court, on the basis of well-settled law, rejects the use of applicant flow statistics as a measure of discrimination because the applicant flow data was tainted by the discrimination.

B. Relevant Labor Pool

Rejecting the actual applicant pool as a valid definition of the “available labor force”, Plaintiffs' two experts used other data to construct the available labor force for the position of maintenance man for the relevant years. Plaintiffs' experts took into account the specifications and duties of “maintenance man” and the uncontroverted fact that it was a low or semi-skilled entry level job requiring no experience before hire. Both experts used data from the 1970 and 1980 census for the 11 county area compris-

ing District 8. In constructing the available labor force, the experts chose certain occupational categories to include from the census data of 1970 and 1980.

One of Plaintiffs' experts examined the actual applications filled out by women who applied and by men who were hired for maintenance man jobs. These applicants noted their paid work histories on the application form. The application showed that applicants came from varied work backgrounds including sales workers, clerical workers, craft workers, farmers, farm laborers, general laborers, and service workers. Therefore, both Plaintiffs' experts independently arrived at the conclusion that the available labor pool for maintenance man should include the above categories from the census. Although the Highway Commission claims that sales and clerical workers should be excluded because of a presumed lack of interest in the maintenance job, Plaintiffs' experts testified that between 1975 and 1980, 20% of the men who were hired and 52% of the women who applied had clerical experience; 11% of men and 26% of women had a prior history in sales. Consequently, men and women in sales and clerical jobs were included by the experts in their definition of available labor force. The Plaintiffs' experts and the trial court concluded that women comprised between 35-48% of the available labor force for the maintenance man job between 1975 and 1980.¹

¹ Plaintiffs' experts adjusted the 1970 and 1980 census data for age, education and driver's license to meet the minimal requirements for hire into the job of maintenance man: an eighth grade education and an ability to operate light weight motor equipment. Contrary to Petitioners' assertions, Plaintiffs never argued or presented "unrefined" general population statistics as the relevant labor force.

The trial court found that:

[t]he statistical evidence presented in this case clearly establishes a prima facie case of employment discrimination. The Plaintiffs' theory that the Highway Commission's word-of-mouth recruiting practices produced an abnormally small pool of female applicants is supported by the fact that there was a gross and statistically significant disparity between the number of women who actually applied for maintenance man positions and the number of female applicants expected under the moderate and conservative definitions of the labor pool. Similarly, the Plaintiffs' contention that the unregulated hiring procedure and the often hostile interview process resulted in the denial of employment opportunities to female applicants on account of their sex is illustrated by the statistically significant difference between the number of women hired for maintenance man positions and the number of females expected to be hired, and by the disparity that existed in the static work force.

(Pet. App., p. 51a).

The Petitioner mischaracterizes the trial court's holding when it states that:

[t]he district court acknowledged that Petitioners' 'bottom line' statistics demonstrated that female applicants had a slightly better chance (2.6%) of being hired than male applicants (2.5%). Nevertheless, the court based its finding of class wide intentional discrimination on the disparity between the number of women represented and the general population and the number in Petitioners' work force.

(Petition, p. 5).

The district court made no such finding! In fact, the district court rejected the applicant flow statistics (which Petitioner characterizes as "bottom-line statistics") be-

cause the applicant flow data was tainted by the discriminatory practices of the Highway Department. Thus, the district court and presumably the jury discredited the applicant flow data as a valid measure of discrimination or lack thereof.

Furthermore, the district court did not base its finding of class wide discrimination on disparity between the number of women in the general population and the number in the Highway Department's work force. The Plaintiffs did not offer general population statistics! Rather, the Plaintiffs offered labor market data refined by job category, age and driver's license. Petitioners' insistence that the statistics involve "general population data" is misleading and inaccurate.

The Highway Department's definition of the relevant work force for the maintenance man job was rejected by the judge and the jury. Out of 40,000 potential job categories described in the Missouri Division of Employment Security code book, the Highway Department chose 28 jobs which it represented as comparable to the maintenance man job. The 28 job categories represent a work force which is over 90% male. The Highway Department argued that the people in these 28 jobs (out of 40,000 potential job categories) constituted the "available labor force" for maintenance jobs. The judge and jury, however, rejected the Highway Department's definition of the available labor pool for the maintenance man job. The fact finders simply refused to believe the Highway Department's evidence.

Finally, contrary to Petitioners' assertions (*See* Petition, p. 19), this case was indeed one in which "the trial

court was confronted with the 'inexorable zero' that would make otherwise relevant statistical comparisons meaningless." *See Teamsters v. United States*, 431 U.S. 324, 342 (1977). The first female "Maintenance man" was hired one and one-half years after Jane Catlett filed her EEOC charge! The highest number of females hired in one year was 1978, the year Catlett filed suit. The "inexorable zero" was the most persuasive statistic in the evidentiary record.

C. Anecdotal Evidence

Petitioner quietly acknowledges that the record contains anecdotal evidence of discrimination as well as statistical evidence. The Petitioner characterizes this evidence as "limited". (*See* Petitioners' Writ of Certiorari, p. 5, n. 2). In the same footnote, the Petitioner states that "[t]he Eighth Circuit did not find the few instances of discrimination to be sufficient to support an inference of intentional discrimination against the class." This characterization of the anecdotal evidence and of the Eighth Circuit's finding is totally misleading.

In fact, the Eighth Circuit stated with regard to the anecdotal evidence that:

In this case the record of anecdotal evidence, read in the light most favorable to the class, reveals *numerous* instances suggesting Missouri was not receptive to the idea of female maintenance workers.

(Petitioners' Appendix, p. 10a) (emphasis added). The court goes on to recite at length the nature of the anecdotal evidence.

Sixteen members of the class testified regarding their individual experiences with the Highway Department officials. The class consisted of 155 women. Thus, 10% of the class testified. This evidence is hardly "limited." The anecdotal evidence of bias brought "the cold numbers convincingly to life." *International Bhd of Teamsters v. United States*, 431 U.S. 324, 339 (1977). During the job interviews, male interviewers probed women with questions about how their husbands would react to their working with men, how they felt about the lack of bathroom facilities and how they felt about working around people who use "curse words". Women testified that in the job interviews, their interest in the job was openly questioned despite the fact that they were present at the interview. They were told that their size would hinder their ability to handle the job; that they were more suited for secretarial jobs and that they would have to lift tractors by themselves or that the supervisor had no intention of hiring a woman. The trial court noted some of the anecdotal evidence in its findings:

Regarding those women who were interviewed, the interviewers discouraged several female applicants by asking questions in a manner indicating that the interviewers did not believe the applicant could handle the job, while the interviewers did not question male applicants in a similar manner. During the interviews, the interviewers repeatedly rejected the assertions of female applicants that they were willing and able to perform maintenance man duties by making comments in the interview sheets such as "I am not sure that she would be satisfied although she strongly indicates that our work is what she is looking for," and "she applied for job as flag man and might not be happy with routine maintenance man duties even

though she admitted willingness to try." (Pet. App., p. 39a-40a).

The employment interviews in District 8 for the maintenance man position were conducted in settings which intimidated and discouraged female applicants, and were conducted in a manner to suggest that the females were not seriously being considered for the jobs. (Pet. App., p. 40a).

In addition, there were several instances where the interviews of female applicants in District 8 were not conducted in private rooms normally used for interviewing, but were done in open areas with large numbers of Highway employees present who would hear and react to the interview. This practice inhibited and intimidated the female applicants, and a similar procedure was not used in the interviews of male applicants in District 8. There were also instances where the interviewers tried to discourage female applicants by suggesting that the applicant's husband would become jealous if the applicant had to spend the night working on the road in emergencies with male maintenance men, or by suggesting that the female applicant would be offended by the language of the male maintenance men. (Pet. App., p. 41a).

In a similar vein, female applicants for the maintenance positions in District 8 were reluctant to attend interviews because of telephone calls from interviewers who attempted to discourage the applicants by emphasizing the negative aspects of the job and by advising the applicants that another person was likely to be hired for the position. There were instances where hiring officials in District 8 encouraged female applicants to pursue other jobs outside the Highway Commission. (Pet. App., p. 41a).

In addition to the oral testimony, the record was replete with documentary evidence showing interviewers' recorded comments about the women they interviewed. The trial court found:

The fact that female applicants in District 8 were not given serious consideration for employment is demonstrated by comments made by interviewers on the interview sheets regarding the physical attractiveness of female applicants, and by undue emphasis given by interviewers to height and weight of female applicants and failing to hire them. Interviewers attempted to discourage female applicants by telling the applicants that they were not strong enough or built right for the job. One interviewer disqualified female applicants who were "too feminine."

(Pet. App., p. 41a-42a).

Thus, the documentary, as well as anecdotal evidence, enhanced the statistical evidence, sustaining Plaintiffs' burden of proof.

The Petitioners falsely represent that "the evidence was uncontroverted, that with respect to those persons who actually applied, the Commission had not discriminated" (Petition, p. 19) is false. In fact, the evidence was and the trial court concluded that:

In addition to a substantial and convincing amount of revelant statistical evidence, Plaintiffs have enhanced the statistics with direct evidence that the hiring officials in District 8 intentionally discriminated against women as part of a regular pattern in practice. This evidence includes the consistent use of interviews by hiring officials *to discourage and intimidate female applicants*, the refusal on the part of the Highway Commission to promulgate objective guidelines to correct a hiring process that was known by the Commission to be discriminatory, and the purposeful failure on the part of the Commission to change its word-of-mouth recruiting policy that generated a disproportionately low number of female applicants. This evidence of discriminatory intent removes any ques-

tion that the disparities established by the statistics arose merely as a matter of chance.

(Pet. App., p. 53a-54a) (emphasis added). The court further added:

In light of the evidence demonstrating a pattern of discrimination against female applicants in District 8, this Court finds that the Commission's knowledge that the promulgation of guidelines was necessary to avoid discriminatory results, coupled with its failure to regulate the hiring process in District 8, constituted a *prima facie* showing of intentional employment discrimination. The Commission has not rebutted the Plaintiffs' *prima facie* showing . . . Moreover, . . . the Court concludes that the Plaintiffs have established by a preponderance of the evidence that the unregulated hiring process used by District 8 constituted a pattern in practice of intentional discrimination which denied the Plaintiffs employment opportunities on account of their sex.

(Pet. App., p. 58a).

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REASONS FOR NOT GRANTING THE WRIT

The Highway Department, in challenging the liability determination, limits its Petition for Writ of Certiorari to the Title VII issues presented in this case. (Petition, p. 4, n. 1). The present inquiry therefore reaches no further than Rule 52a which reads in part as follows:

Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous. . . .

Under Title VII, the question of intentional discrimination under Section 703(h) is a pure question of fact subject to

the "clearly erroneous standard" of Rule 52a. *Pullman Standard v. Swint*, 456 U.S. 273, 287 n. 16 (1982).

The Highway Department's Certiorari Petition ignores the standard of review by focusing its arguments away from the record and by mischaracterizing the Eighth Circuit's holdings.

I. THE EIGHTH CIRCUIT'S HOLDING BELOW ON THE ISSUE OF LIABILITY TO THE CLASS RAISES NO IMPORTANT ISSUES OF FEDERAL LAW WHICH THIS COURT HAS NOT ALREADY RESOLVED.

Petitioner states:

The Eighth Circuit nevertheless held, solely on the basis of *Teal* (referring to *Connecticut v. Teal*) that proof that applicants were treated equally at the bottom-line was no defense to a claim that the class of applicants and non-applicants (considered together) were subject to disparate treatment.

(Petition, p. 12). This was not the holding of the Eighth Circuit. The Eighth Circuit Court did not reject the defense that the Highway Department hired an equal percentage of female applicants as male applicants. Rather, it was the factfinders who rejected this defense: the jury under 42 U.S.C. § 1983 and the judge under Title VII.

The Petitioner further characterizes as a "holding" the Eighth Circuit's dismissal of the use of actual applicant flow statistics in this case. The Eighth Circuit states:

Furthermore, Missouri cannot shield itself from liability by pointing out that it hired 2.6% of female applicants (8 of 312) and only 2.5% of male main-

tenance applicants (89 of 3,566). Victims of a discriminatory policy cannot be told that they have not been wronged because other females have been hired. *See Connecticut v. Teal*, 457 U.S. 440, 455 (1982); *See also, e.g., Craik*, 731 F.2d at 474 (males and females were selected at equal rates but no female ever prevailed when another candidate was male). While the equal hiring rate constituted relevant evidence, *See Teal*, 457 U.S. at 454, it did not entitle Missouri to judgment as a matter of law. The jury and court were free to weigh the inference of non-discrimination arising from the hiring rate against the inference of discrimination arising from the class' anecdotal and statistical evidence.

This evidence, viewed in its totality, was sufficient to support the jury's verdict and the court's conclusion that Missouri, in hiring maintenance workers, engaged in a pattern or practice of discrimination against women. *See Anderson v. City of Bessemer City*, 470 U.S. 564, 573-76 (1985)

(Pet. App., pp. 12a-13a).

This statement by the Eighth Circuit cannot be interpreted as a "holding" that the "bottom-line" defense is inapplicable in a class action case. The Eighth Circuit's reference to *Connecticut v. Teal* was merely a reference to the principle that equal hiring rates constitute relevant evidence. The court does not hold, as the Highway Department states, that the "bottom-line" defense is not an "answer" to a claim of class wide as opposed to individual discrimination. The discussion of *Teal* occurred in the context of the Eighth Circuit's discussion of the

standard of review: "While the equal hiring rate constituted relevant evidence, *see Teal*, 457 U.S. at 454, it did not entitle Missouri to judgment as a matter of law." (Pet. App., p. 13a).

Petitioners gloss over the standard of review which binds the Eighth Circuit under Rule 52. All the Eighth Circuit is saying here is that the jury and the judge were entitled to weigh the equal hiring rate statistics along with the other evidence and to reject it as a valid measure of discrimination. The equal hiring rate evidence was not excluded from the trial. The trial court allowed it into the record along with the other statistics offered by the parties. The Court of Appeals merely noted that the equal hiring rates do not entitle Missouri to summary judgment on the issue of liability. The Court of Appeals does not extend *Teal* to class actions. Rather, the Court of Appeals discusses *Teal* only in the context of a review of the substantiality of the evidence of the record and only in the context of whether the trial court's finding of liability was "clearly erroneous".

The Highway Department says that the Eighth Circuit "rejected its defense based on actual hiring statistics." The Eighth Circuit did not reject the defense. The jury and the trial court rejected the defense, as they were entitled to do. Thus, Petitioners' arguments for review evaporate when the Eighth Circuit's decision is examined in the proper context.

II. THE HOLDING BELOW DOES NOT RAISE THE QUESTION OF WHETHER A STATISTICAL DISPARITY BETWEEN THE PERCENTAGE OF WOMEN IN AN EMPLOYER'S WORK FORCE AND THE PERCENTAGE OF WOMEN IN THE GENERAL POPULATION IS SUFFICIENT TO SHIFT THE BURDEN TO THE EMPLOYER TO PROVE DIRECTLY THAT DISPARITY RESULTS FROM LACK OF INTEREST OR QUALIFICATIONS.

The Petitioners state:

Under the decision below, if a Title VII class action plaintiff is able to demonstrate that an employer does not hire or maintain a work force that mirrors the representation of women in the population, the burden shifts to the employer to demonstrate, by "direct evidence," that such a "disparity" is the result of a lack of qualifications or interest, or both, on the part of female members of the class. The court's requirement that the employer produce "direct evidence of lack of interest or qualifications strongly suggests that statistical evidence demonstrating lack of interest—a traditional method of countering plaintiffs' statistical evidence is inadequate.

(Petition, p. 8).

The Court of Appeals did not "require" direct evidence of lack of interest. The court's reference to the Highway Department's failure to adduce direct evidence is made in the context of a discussion of the factfinders' obvious rejection of the Highway Department's statistical evidence of lack of interest. The trial court permitted the Highway Department to adduce certain statistical evidence in support of its argument that women in general do not apply for maintenance man jobs because they have no interest in the jobs. This evidence was consid-

ered by the jury under 42 U.S.C. § 1983 and by the judge under Title VII. Since the jury and judge explicitly found that the Highway Department discriminated against women in recruitment practices, they rejected the Highway Department's evidence of lack of interest. Given this rejection, the Eighth Circuit, in reviewing whether the evidence was sufficient to support the judgment, merely noted that the Highway Department put on no direct evidence to overcome the unpersuasive statistical evidence of lack of interest.

Throughout the Petition for Certiorari, the Petitioners repeatedly misrepresent to this Court that the Plaintiffs' relevant labor pool was nothing more than unrefined general population statistics. As previously shown, Plaintiffs' potential labor pool consisted of highly refined labor market statistics derived from certain occupational categories reported in the 1970 and 1980 census. The Petitioners cavalierly characterize this refined labor data as "general" population statistics. (*See, e.g.*, Petition, pp. 5, 9).

Petitioners assert that they were "not permitted" to rebut Plaintiffs' evidence of the relevant labor force for maintenance man jobs. (*See* Petition, p. 19). To the contrary, however, the Highway Department was permitted by the trial court to adduce evidence to rebut Plaintiffs' statistics.

In fact, the Highway Department offered a great deal of statistical evidence in support of its argument that women as a general rule are not interested in the entry level maintenance job. The evidence consisted of Division of Employment Security data collected by the Missouri

Division of Employment Security in the course of processing applications for unemployment insurance. The Highway Department's evidence was that out of some 40,000 job categories, there are 28 which are comparable to the maintenance position and very few women, when asked by the Division of Employment Security which jobs they are interested in, volunteer any of the 28 jobs. The Highway Department did not adduce any *direct* evidence of lack of interest by women in the maintenance job.

The Eighth Circuit's discussion of the Highway Department's "lack of interest" evidence and arguments is again in the context of a review of the sufficiency of the evidence under the clearly erroneous rule. All the Eighth Circuit says is that the jury and the court were entitled to reject the Highway Department's "lack of interest" defense, as fact finders. The trial court did not exclude the Highway Department's "lack of interest" evidence. Obviously, the judge and the jury as fact finders did not find the evidence persuasive. The Petitioners' argument suggests that the Eighth Circuit should have, as a matter of law, reversed the liability finding because the jury was allowed to consider the Plaintiffs' evidence of relevant labor force based upon refined census labor market data. Obviously, there is no law to support such an exclusion of evidence.

The fact that the maintenance position is a traditionally male-dominated job category does not render Plaintiffs' evidence inadmissible as a matter of law. Plaintiffs' evidence of the relevant labor market for the maintenance job consisted of refined labor market data taken from the census of 1970 and 1980. Unlike the facts of *Mazus*

v. Department of Transp., 629 F.2d 870, 875 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981), cited by Petitioners in their Argument for Review (Pet., p. 17), Plaintiffs in this case showed that "inside" workers such as clerical and sales workers were interested in the maintenance job.

The factfinders, therefore, were entitled to reject the Highway Department's claim that sales workers and clerical workers should not be included in the definition of the relevant labor pool for the maintenance position. Petitioners' attack on inclusion of these job categories in the relevant labor market is based upon an argument that in sex discrimination cases involving a job which has been traditionally filled by males, Plaintiffs may not adduce evidence that the relevant labor market may include something other than the actual applicant pool. As a matter of law, of course, this argument is indefensible. This is particularly true in a case focussing on a low skilled entry level position such as maintenance man which required only an eighth grade education and an ability to operate light weight motor equipment. Although Plaintiffs did not use "general population statistics", this Court long ago approved the use of general census statistics as a method of defining the relevant labor pool for jobs of low skill. *See Teamsters v. United States*, 431 U.S. 324 (1977) and *Johnson v. Transportation Agency*, 107 S.Ct. 1442 (1987). Furthermore, general population statistics, or in this case refined labor market statistics based upon census data, may be preferable as a definition of the relevant labor pool when the actual applicant flow data is tainted. As this Court stated in *Dothard v. Rawlinson*:

There is no requirement, however, that a statistical showing of disproportionate impact must always be based on analysis of the characteristics of actual applicants. The application process itself might not adequately reflect the actual potential applicant pool, since otherwise qualified people might be discouraged from applying because of a self-recognized inability to meet the very standards challenged as being discriminatory.

Dothard v. Rawlinson, 433 U.S. 321, 330 (1977) (citation omitted). In this case, the Plaintiffs showed that the applicant pool was tainted by the Highway Department's discriminatory recruitment and hiring practices. Plaintiffs persuaded the court and the jury that the relevant labor pool for the job of maintenance man should not be defined as the actual applicant pool. Rather, the relevant labor pool consisted of women and men in the actual labor force in certain job categories, who held a driver's license and who were between the ages of 18 and 70. In effect, the Petitioners argue that as a matter of law, the judge and the jury were not permitted to consider this evidence because this is a sex discrimination case involving a job category which has traditionally been occupied by an all male work force.

The Petitioners state that:

In a class action disparate treatment case alleging sexual discrimination in hiring, particularly for non-traditional, semi-skilled jobs, as employer must be allowed to rebut the Plaintiffs' general work force statistics with more refined and more probative statistical comparisons focusing on the pool of qualified and interested candidates.

(Petition, p. 18). The Highway Department was allowed to rebut the Plaintiffs' evidence! Petitioners would have

this Court believe that the evidence of the Highway Department had been excluded! Rather, it was included and it was weighed by the fact finders and rejected. The Highway Department was not deprived of a defense. The Petitioners' arguments for review can be distilled into one simple, absurd proposition: in a sex discrimination class action involving a job which has been historically dominated by men, plaintiffs may not adduce evidence of a potential applicant pool but must instead be confined to evidence of the actual applicant pool in defining the relevant labor market for the job in question. The proposition is absurd. The law in support of it is nonexistent.

The Petitioners' argument for review is based upon a mischaracterization of the Eighth Circuit's holding on the issue of liability. All the Eighth Circuit held was that as a matter of law, Plaintiffs' statistical and anecdotal evidence was relevant and sufficient to support the court's decision.